according to the terms of their deed and subject to the public trust." Opinion, p. 44 (App. 37).

In their brief on appeal to the Michigan Supreme Court, Petitioners for the first time raised a federal taking claim. Petition, p. 3. Petitioners' entire statement of the claim in their brief was relegated to the following footnote:

> Regardless of whether action from this Court, or the Legislature, any retreat from the water's edge proclamation in *Hilt* that would deprive beachfront property owners of land to which they had either title or exclusive right to use, and would therefore constitute an unconstitutional taking without just compensation under both State and Federal law. See *Peterman, supra*, brief of Amici curiae Michigan Chamber of Commerce, et al, Section III C, and brief of Defendants of Property Rights, Section II.

Brief on Appeal – Appellees, p. 21, n. 9.

Petitioners' first substantive presentation of a federal taking claim in the state court proceedings, along with their first mention of a federal due process claim, appears in their Motion for Rehearing filed after the Michigan Supreme Court issued its Opinion. Petition, p. 4; Brief in Support of Defendants'/Appellees' Motion for Rehearing, pp. 20-23.

REASONS FOR DENYING THE WRIT

I. THE MICHIGAN SUPREME COURT DID NOT CONSIDER OR DETERMINE ANY FEDERAL CONSTITUTIONAL QUESTION IN ITS OPINION.

The most obvious reason why certiorari should be denied in this case is that the Michigan Supreme Court did not consider or determine any federal constitutional question in its Opinion. Instead, the Court defined the scope of the public trust doctrine in accordance with Michigan common law dating back more than a century.

This Court is not vested with jurisdiction over a state court decision unless a federal question was raised and decided in the state court. *Cardinale v. Louisiana*, 394 U.S. 437, 438, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969); *Herb v. Pitcairn*, 324 U.S. 117, 125-126, 65 S.Ct. 459, 89 L.Ed. 789 (1945). If a state court decision rests on a state law ground which is independent of any federal question and adequate to support the judgment, this Court lacks jurisdiction to review the decision. *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *Lambrix v. Singletary*, 520 U.S. 518, 522-523, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997). Resolution of an independent federal ground for such a decision could not affect the judgment and would thus amount to an impermissible advisory opinion. *Coleman, supra*.

Petitioners concede that "[t]he extent of the boundary of the public trust and the extent of riparian ownership are questions of state law." Petition, p. 21. Yet, under a century and a half of this Court's decisions enunciating the public trust doctrine applying to the shores of navigable waters as being the sovereign domain of state law, Petitioners' concession is an understatement. In few areas of

the law has this Court held interpretations of state law by a state's highest court to be more inviolate.

In *Shively v. Bowlby*, 152 U.S. 1, 40, 14 S.Ct. 548, 38 L.Ed. 331 (1894), the Court held that "the title and rights of riparian or littoral proprietors in the soil below high water mark of navigable waters are governed by the local laws of the several States, subject, of course, to the rights granted to the United States by the Constitution." The English common law of the sea, adopted as the law in this country governing rights in the shores of navigable waters, applied to each new state upon its admission into the Union, *with title and control of the shore below high water mark being vested in the state as sovereign in trust for the public, to be freely used by all for navigation and fishing. Shively* at 10-18, 57-58. These sovereign lands "are incapable of cultivation or improvement in the manner of lands above high-water mark", yet "are of great value to the public for the purposes of commerce, navigation, and fishery." *Shively*, at 57.

Nearly a century after *Shively*, the Court in *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476-477, 108 S.Ct. 791, 98 L.Ed.2d 877 (1988), held that "it has been long established that *the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit.*" *Id.* at 475 (citing *Shively, supra*, 152 U.S. at 26) (emphasis added). Further, this Court's decisions have long recognized that trust lands may be used not only for navigation, but also for other uses, such as fishing for both shellfish and floating fish. *Phillips Petroleum*, at 476.

Recently, in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997), the

Court reaffirmed in sweeping terms the weighty interests involved in a state's ownership and control of sovereign trust lands. Holding that the Tribe's claim to ownership of the submerged lands of Lake Coeur d'Alene amounted to a quiet title action against the state's special sovereign interests, the Court ruled the claim barred by the state's Eleventh Amendment immunity. *Id.* at 287-288. The Court emphasized that ownership of submerged lands below the high water mark of navigable waters is "an essential attribute of sovereignty," and that these sovereign lands have "a unique status in the law and [are] infused with a public trust the State itself is bound to respect." *Id.* at 283. Each state's ownership of these sovereign lands arises from the equal footing doctrine, so that it is conferred "by the Constitution itself." *Id.*

This Court applied the public trust doctrine to the Great Lakes more than a century ago in its seminal decision in *Illinois Central RR Co. v. Illinois*, 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018 (1892), ruling that the English common law of the sea applies to the waters and submerged lands of the Great Lakes:

> We hold, therefore, that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters in the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations.

146 U.S. at 436-437. The state can no more abdicate its trustee obligations, leaving trust lands "entirely under the use and control of private parties, . . . than it can abdicate

its police powers in the administration of government and the preservation of the peace." *Id.* at 453.

While *Illinois Central* was "necessarily a statement of Illinois law", *Coeur d'Alene Tribe of Idaho, supra*, 521 U.S. at 285 (quoting *Appleby v. City of New York*, 271 U.S. 364, 395, 46 S.Ct. 569, 578, 70 L.Ed. 992 (1926)), its ruling that the public trust doctrine under the common law of the sea applies to the Great Lakes was soon adopted as the law of Michigan.

In *People v. Silberwood*, 110 Mich. 103, 108, 67 N.W. 1087 (1896), the Michigan Supreme Court upheld the validity of a state statute designating submerged lands of Lake Erie as public shooting grounds. Initially, the Court explained that the question of title to the beds of the Great Lakes was not directly at issue in any of its prior decisions. *Silberwood*, at 106. The *Silberwood* Court then adopted the ruling of *Illinois Central* that the public trust doctrine under the common law of the sea applies to the Great Lakes, reasoning that: "the law enunciated [in *Illinois Central*] ought to stand as the law of this state. It commends itself to one's reason and judgment, and avoids many difficulties incident to a different construction of the law." *Silberwood*, at 108. Three decades later, in *Hilt v. Weber*, 252 Mich. 198, 213, 217, 233 N.W. 159 (1930), the Court reaffirmed that it "had not established a rule of property as to land upon the Great Lakes, contrary to the law of the sea."

In its Opinion, the Michigan Supreme Court properly relied on *Silberwood*, *Hilt*, *Nedtweg v. Wallace*, 237 Mich. 14, 17, 208 N.W. 51 (1926), and other early Michigan cases as establishing the bedrock principle of Michigan common law that the public trust doctrine inalienably preserves

the waters and lands of the Great Lakes for use by the public for "fishing, hunting, and boating for commerce or pleasure." Opinion, pp. 10-11 (App. 8-9). In then ruling that the public trust extends to the ordinary high water mark, the Court relied on its early case of *Venice of America Land Co.*, 160 Mich. 680, 701-702, 125 N.W. 770 (1910), in which the Court adopted the view of Justice Hooker's minority opinion in *State v. Lake St. Clair Fishing & Shooting Club*, 127 Mich. 580, 87 N.W. 117 (1901). In turn, Justice Hooker's opinion in *Lake St. Clair Fishing & Shooting Club* declared in no uncertain terms that the ordinary high water mark is the upper boundary of Great Lakes trust lands:

> We must take judicial notice that the Great Lakes are navigable waters, and while, as in all cases of water, there must be a line where the water meets the shore, and consequently shallows, the legal characteristics of navigable water attach to all of it. It is an old and well-settled rule that the privileges of the public are not limited to the channel, or to those parts which are most frequently used, but extend to high-water mark in all tide waters.

Id. at 585-586. Thus, the boundary of Michigan's Great Lakes public trust lands has been set at the ordinary high water mark since at least the 1910 decision in *Venice of America Land Co.*

The prevailing rule in the other Great Lakes States of Wisconsin, Minnesota, Illinois, Indiana, Ohio, Pennsylvania and New York is the same as held by the Michigan Supreme Court in its Opinion, and is in accord with the common law of the sea as enunciated in *Illinois Central, supra* and *Shively, supra*. The boundary of the public trust

doctrine under the common law of the majority of Great Lakes States is the ordinary high water mark. See Brief on Appeal – Appellant, pp. 39-46. Like Michigan, both Wisconsin and Minnesota have judicially defined the ordinary high water mark in terms of key physical characteristics of the shore, while Ohio and Indiana have by regulation adopted the ordinary high water mark according to International Great Lakes Datum elevations. *Id.*

The Michigan Supreme Court adopted Wisconsin's definition of the ordinary high water mark, i.e., "the point on the . . . shore up to which the presence and action of the water is so continuous as to leave a distinct mark. . . ." Opinion, p. 27 (App. 23). This definition captures the essence of the ordinary high water mark under the common law of the sea, i.e., the point below which the land "is for the most part not dry or maniorable." *Borax v. City of Los Angeles*, 296 U.S. 10, 23, 56 S.Ct. 23, 80 L.Ed. 9 (1935). It also mirrors the definition under the Minnesota common law, i.e., the line below which "the presence and action of the water are so common and usual . . . as to mark upon the soil of the bed a character distinct from that of the banks. . . ." *Carpenter v. Board of Comm'rs of Hennepin County*, 56 Minn. 513, 522; 58 N.W. 295 (1894). It likewise mirrors Michigan's own definition of the ordinary high water mark for inland waters in MCL 324.30101(i), i.e., "the line between upland and bottomland that persists through successive changes in water levels, below which the presence and action of the water is so common or recurrent that the character of the land is marked distinctly from the upland. . . . " Opinion, pp. 26-28 (App. 22-24).

Throughout its Opinion, the Michigan Supreme Court relied exclusively on Michigan common law dating back to

the 19th century in reaching its overall conclusion that "plaintiff, as a member of the public, may walk the shores of the Great Lakes below the ordinary high water mark," and that "defendants hold private title to their property according to the terms of their deed and subject to the public trust." Opinion, p. 44 (App. 37). Because the Court's decision is deeply rooted in the Michigan common law, independent of any federal question, this Court lacks jurisdiction to review the decision. *Coleman, supra*; *Lambrix, supra*.

II. PETITIONERS' ATTEMPT TO AVOID THE JURISDICTIONAL BAR TO THIS COURT'S REVIEW IS BASED ON A GLARING MISINTERPRETATION OF MICHIGAN LAW WHICH WAS SOUNDLY REJECTED BY THE HIGHEST COURT OF MICHIGAN

In an effort to evade the jurisdictional bar to this Court's review established by the adequate and independent state law ground which so soundly supports the Opinion, Petitioners resort to the argument that "the Michigan Supreme Court's Opinion represents a sudden and unexpected change in property law." Petition, p. 4. As Petitioners' argument goes, the Opinion thus effects an unconstitutional taking under *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), and *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979). Petition, pp. 5-21, 22-24.

Petitioners' attempt to cast the Opinion as somehow announcing a sudden change in Michigan property law is unavailing. In the state court proceedings, Petitioners sought a ruling which would have amounted to one of the

biggest giveaways of public property in American history – the grant to private upland owners along Michigan's 3,288 miles of Great Lakes shores of title down to the actual edge of the waters, to the exclusion of the public. The argument Petitioners advance to this Court, the same one they unsuccessfully advanced below, is founded on a tortured misinterpretation of the Michigan Supreme Court's 1930 decision in *Hilt, supra*. Petitioners ignore the essential ruling of *Hilt* in favor of selectively extracting isolated quotes, to buttress a flawed legal argument that defies more than a century of well-settled Michigan common law.

The most obvious flaw in Petitioners' argument arises from their refusal to even acknowledge, much less discuss, the common law of the sea which *Hilt* itself ruled has governed Michigan's Great Lakes shores since at least as early as the Michigan Supreme Court's 1896 decision in *Silberwood, supra*. Instead, Petitioners argue that the nomenclature "water's edge" as used in *Hilt* is intended to mean the literal edge of the moving waters at any given time. Petition, p. 7. Likewise, they argue that this Court in *Illinois Central* allegedly confined the reach of the public trust doctrine to "lands *under* the navigable waters of Lake Michigan." Petition, pp. 21-22.

Any doubt that the language Petitioners quote from *Illinois Central* means Great Lakes lands *extending to high-water mark and thus including the shore*, is resolved by this Court's decision in *Illinois Central RR Co. v. City of Chicago*, 176 U.S. 646, 20 S.Ct. 509, 44 L.Ed. 622 (1900) (*"Illinois Central II"*). The Court in *Illinois Central II* confirmed that, under the common law of the sea, "a grant of lands by the state *does not pass title to submerged lands below high-water mark, and that this principle also applies*

to the Great Lakes." Id. at 660 (emphasis added).[3] The nomenclature "lands under the navigable waters" and "submerged lands" is used interchangeably in *Illinois Central* as a pithy means of referring to all lands lying below the ordinary high water mark, embracing the obvious fact that these shore lands are "ordinarily" covered with water, although from time to time they might be exposed.

The nomenclature "water's edge" which Petitioners extract from *Hilt, supra* is precisely to the same effect. State and federal decisions have consistently used "water's edge" to mean the edge of the water at high water mark. See Brief on Appeal – Appellant, pp. 24-26. As the court in *State v. Great Falls Mfg. Co.*, 76 N.H. 373, 83 A. 126, 127 (1912), held: "There was a general understanding that . . . when it was said that the title of the littoral owners extended to the 'water's edge', the idea intended was that it was limited by the high-water mark."

The issue in *Hilt* was the boundary of a lakefront owner's private title, *not* the boundary of the public trust. Particularly, the issue was the title to high and dry *relicted or accreted* land (Opinion, p. 25, n. 18, App. 22) – land which by common law definition lies above the ordinary high water mark and is thus outside the scope of the public trust doctrine (see Brief on Appeal – Appellant,

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[3] Although Petitioners allege that the decision below is also contrary to *Massachusetts v. New York*, 271 U.S. 65, 93, 46 S.Ct. 357, 70 L.Ed. 838 (1926) and *Vermont v. New Hampshire*, 289 U.S. 593, 605, 53 S.Ct. 708, 77 L.Ed. 1392 (1933), both cases involved this Court's determination of an interstate boundary along navigable waters and *not* the scope of the public trust.

pp. 21-22).[4] The *Hilt* Court declares at the outset that the decision is limited to relicted and accreted lands only: "Lest we be misled, we must keep it clear that the issue . . . . covers only dry land, extending meandered upland by gradual and imperceptible accession or recession of the water, on the lake side of the meander line." *Hilt* at 203.

Ignoring the actual issue decided in *Hilt*, Petitioners elevate the following isolated quotation from *Hilt* to a binding rule of law: "The riparian owner has the *exclusive use* of the bank and shore, and may erect bathing houses and structures thereon for his business and pleasure." Petition, p. 7 (quoting *Hilt* at 226). Petitioners rely on this quotation as the foundation for their "exclusive possession" argument, yet they fail to quote the full sentence in *Hilt* which states:

> The riparian owner has the exclusive use of the bank and shore and may erect bathing houses and structures thereon for his business or pleasure, 45 C.J. p. 505; *Ferry Pass, I. & S. Ass'n v. White River I. & S. Ass'n*, 57 Fla. 399, 48 So. 643, 22 L.R.A. (N.S.) 345; *Town of Orange v. Resnick* [94 Conn. 573, 578, 109 A. 864 (1920)]); although it also has been held that he cannot extend structures into the space between low and high-water mark, without consent of the State (*Thiesen v.*

[4] Under the common law of the sea, upland owners on navigable waters have title and exclusive possession of dry land formed by the gradual and imperceptibly slow processes of reliction and accretion, which thus becomes unfit for purposes of navigation, hunting, and fishing but is suitable for human occupation, i.e., land above the ordinary high water mark. *Nedtweg v. Wallace*, 237 Mich. 14, 211 N.W. 647 (1927). See also *Jefferis v. East Omaha Land Co.*, 134 U.S. 178, 181, 191-193, 10 S.Ct. 518, 33 L.Ed. 872 (1890).

> *Railway Co.*, 75 Fla. 28 [78 So. 491, L.R.A. 1918E, 718;]).

Hilt, at 226. The fallacy of Petitioners' argument becomes almost painfully evident from the full passage, which begins by citing cases ruling that the riparian owner may erect structures on the shore, and ends by citing a case ruling that the riparian owner may *not* do so.

All the Justices of the Michigan Supreme Court soundly rejected Petitioners' argument, unanimously agreeing that none of the various state laws included in the discussion in which the quoted passage appears were adopted as a rule of law in *Hilt*. Instead, the passage is part of the *Hilt* Court's discussion supporting its correction of its departure from the common law in *Kavanaugh v. Rabior*, 222 Mich. 68, 192 N.W. 623 (1923) and *Kavanaugh v. Baird*, 241 Mich. 240, 217 N.W. 2 (1928) (the "*Kavanaugh* cases"). Opinion, pp. 34-36 (App. 29-30). When the *Hilt* Court discussed the rights of upland owners under the laws of other states, it did not adopt any of these rules and "it did not alter the public trust or preclude the public from walking within it." Opinion, p. 36 (App. 30); Justice Markman's minority opinion, pp. 52-53 (App. 83-84).

All of the land at issue in *Hilt* was permanently dry *relicted* land lying lakeward of the meander line, and by definition, above the ordinary high water mark. The *Hilt* decision left intact the inalienable rights of the public to use the sovereign trust lands of the Great Lakes lying below ordinary high water mark, as confirmed by its ruling that: "Until the *Kavanaugh* cases . . . this court was in accord with other American courts in applying the common law of waters and had not established a rule of property as to land upon the Great Lakes contrary to the law of the sea." *Hilt*, at 213.

Because Petitioners' "exclusive possession" argument is founded on a gross misinterpretation of *Hilt*, it is fatally flawed. It is also glaringly contradicted by Petitioner Mr. Goeckel's admission that he and other members of the public regularly walk along the beach in front of his property, and that the public has the right to do so because: "They're not traveling over my property. They're traveling next to the water's edge, which is the State of Michigan's property." Appellant's Appendix on Appeal, pp. 61a-62a.

Equally unavailing is Petitioners' misinterpretation of *Peterman v. DNR*, 446 Mich. 177, 521 N.W.2d 499 (1994). Petition, pp. 13-15. The issue in *Peterman* was the extent of damages to be awarded for the destruction of the plaintiff's property on Lake Michigan caused by the state's negligent construction of jetties which could have been constructed to improve navigation without entirely destroying the plaintiff's beach and substantial portions of their fast land. *Peterman*, at 181, 201-202. The Court held that by virtue of the state's "navigational servitude" (*Id.* at 194), "the general rule is that only the loss of fast lands [above high-water mark] must be compensated", but an exception exists, allowing recovery of damages below high-water mark, where the taking serves no public interest. *Peterman*, at 200, 202. The Court rooted the state's "navigational servitude" in Michigan's public trust doctrine, as follows:

> [W]hen Michigan entered the union of States she became vested with the same qualified title that the United States had; that these waters and the soil under them passed to the State in its sovereign capacity impressed with a perpetual trust to secure to the people their rights of navigation, fishing and fowling. *Collins v. Gerhardt*, 237 Mich. 38, 45-46 (1926). See also *State v. Venice of*

> *America Land Co.*, 160 Mich. 680 (1910); *Nedtweg v. Wallace*, 237 Mich. 14, 16-17, 211 N.W. 647 (1927).

Peterman, at 194, n. 22. Opinion, p. 22, n. 15 (App. 19).

In another ill-informed attempt to buttress their vacuous "exclusive possession" argument, Petitioners quote language from *Lorman v. Benson*, 8 Mich. 18, 30 (1860), to the effect that members of the public who walk the shores for passage do so "not as rightful, but merely by sufferance." Petition, p. 17. However, *Lorman* is *not* a Great Lakes case, but rather involved the rights of a riparian owner on the Detroit River, where the title of private upland owners extends from the ordinary high water mark to the center of the stream, as opposed to the Great Lakes where title to the submerged lands is vested in the state in trust for the public. *Silberwood, supra*, at 106.

Petitioners' "sudden change in Michigan law" argument, founded on their tortured misinterpretation of *Hilt* as having granted them title and exclusive possession down to the very edge of the moving waters of Lake Huron, is spurious. Neither title to nor exclusive possession of the shore of Lake Huron was ever a stick in Petitioners' bundle of property rights. Instead, under Michigan common law dating back more than a century, the property now owned by Petitioners is that defined in their deed, and "was originally conveyed *subject to specific public trust rights in Lake Huron and its shores up to the ordinary high water mark*." Opinion, p. 4, App. 4 (emphasis in original).

III. PETITIONERS' FEDERAL TAKING AND DUE PROCESS CLAIMS FALL WITH THEIR VACUOUS "EXCLUSIVE POSSESSION" ARGUMENT

Petitioners' federal taking and due process claims fall along with their spurious exclusive possession argument. As the Michigan Supreme Court stated so succinctly, the state could not possibly "take what it already owns." Opinion, p. 43 (App. 35).

As this Court held in *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 482, 108 S.Ct. 791, 98 L.Ed.2d 877 (1988), where a state's common law has consistently held that the public trust includes title to submerged lands under navigable waters and has described public uses of the trust lands such as swimming, fishing, and recreation, "any contrary expectations cannot be considered reasonable." Nor did Petitioner Mr. Goeckel, who admitted that members of the public have the right to walk the Lake Huron shore because it belongs to the State of Michigan, have any such contrary expectations.

Petitioners argue that the Court in its Opinion effected a taking and violated due process by "opening Petitioners' private property to public use", citing *Nollan v. California Coastal Commission*, 483 U.S. 825, 831, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); and *Kaiser Aetna v. United States*, 444 U.S. 164, 178, 100 S.Ct. 383, 392, 62 L.Ed.2d 332 (1979). However, the property at issue in *Nollan* was a stretch of privately-owned dry sand located *above* the mean high tide line marking the upper limit of the public beach. *Nollan*, at 827, 840. In *Kaiser Aetna*, the shallow pond at issue had likewise always been privately owned and used under state law. *Id.* at 384. In neither case were rights to public trust lands, below the ordinary high water mark, at issue.

As held in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), this Court's takings jurisprudence "has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property." With this in mind, the Court "assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title." *Lucas*, at 1028 (emphasis in original). Where existing rules or understandings have always restricted a private landowner's bundle of rights, by implication of background principles of state law, it is open to the State at any point to make the implication explicit. *Lucas*, at 1030.

Moreover, where a state court determines that an upland owner's claimed property right is non-existent, as occurred here with respect to Petitioners' claimed rights of title to and exclusive possession of the shore of Lake Huron, there is no taking. *Fox River Paper Co. v. Railroad Commission of Wisconsin*, 274 U.S. 651, 47 S.Ct. 669, 71 L.Ed. 1279 (1927). As the Court explained:

> It is for the state court in cases such as this to define rights in land located within the state, and the Fourteenth Amendment, in the absence of an attempt to forestall our review of the constitutional question, affords no protection to supposed rights of property which the state courts determine to be nonexistent. We accept as conclusive the state court's view of the nature of the rights of riparian owners.

Id. at 657.

IV. PETITIONERS FAILED TO PROPERLY RAISE THEIR FEDERAL CONSTITUTIONAL CHALLENGE IN THE STATE COURT PROCEEDINGS

While the jurisdiction of this Court to grant certiorari is barred by the adequate and independent state law ground that soundly supports the Michigan Supreme Court's Opinion, another ground upon which this Court should refuse consideration of Petitioners' federal constitutional challenge to the Opinion is their failure to properly present any federal taking or due process claim in the state court proceedings.

Because this case comes to this Court from a state court, the relevant jurisdictional statute is 28 U.S.C. § 1257. In relevant part, that statute provides that this Court may review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any . . . right is specially set up or claimed under the Constitution . . . of . . . the United States." 28 U.S.C. § 1257(a). Since the early 19th century, under § 1257(a) and its predecessors, this Court has consistently refused to consider a federal constitutional challenge to a state court decision unless the federal claim was decided by, or properly presented to, the state court. *Howell v. Mississippi*, 534 U.S. 440, 125 S.Ct. 856, 858, 160 L.Ed.2d 873 (2005). Regardless of the significance of the underlying issue, this Court scrupulously adheres to this limitation on its discretion to promote respect for the Court's adjudicatory process. *Adams v. Robertson*, 520 U.S. 83, 92, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997).

In its Opinion, the Michigan Supreme Court did not consider or decide any federal due process claim. The Court did briefly address the issue of an unconstitutional

taking, holding that no taking occurs when the state protects and retains inalienable public rights under the public trust doctrine. Opinion, p. 43 (App. 35-36). However, in so ruling the Court cited its own prior cases of *Peterman, supra*, and *Bott v. Natural Resources Comm.*, 415 Mich. 45, 327 N.W.2d 838 (1982), both of which decided takings issues under the Michigan Constitution, and not the Federal Constitution. *Peterman, supra*, at 184; *Bott, supra*, at 80-82. There is thus flatly no indication in the Opinion that the Michigan Supreme Court believed any federal taking issue was presented, or that it decided anything other than the issue of whether there was a taking in violation of the Michigan Constitution.

Where a state's highest court is silent on a federal question presented to this Court, the Court assumes that the issue was not properly presented, and the petitioner bears the burden of defeating this assumption by demonstrating that the state court had a fair opportunity to address the federal question presented for review. *Adams, supra*, at 86-87. In determining whether an issue was properly presented in the state court, this Court has required petitioners to establish that the claim was raised "at the time and in the manner required by the state law," and to demonstrate that they presented the claim with "fair precision and in due time." *Adams, supra*, at 87.

In compliance with this Court's Rule 14(1)(g)(i) requiring them to specify when and how the federal questions sought to be reviewed were raised in the state court proceedings, Petitioners point to only two places in the record below where they allegedly raised their federal taking and due process claims. The first was in their brief on appeal to the Michigan Supreme Court, and the second in their motion for reconsideration to that court. Petition,

pp. 3-4. In their brief on appeal to the Michigan Supreme Court, Petitioners made only a single passing reference to a federal taking claim in the following footnote:

> Regardless of whether action from this Court, or the Legislature, any retreat from the water's edge proclamation in *Hilt* that would deprive beachfront property owners of land to which they had either title or exclusive right to use, and would therefore constitute an unconstitutional taking without just compensation under both State and Federal law. See *Peterman, supra*, brief of Amici curiae Michigan Chamber of Commerce, et al, Section III C, and brief of Defendants of Property Rights, Section II.

Brief on Appeal – Appellees, p. 21, n. 9. Petitioners failed to even cite to the Federal Constitution, much less to any cases addressing federal takings claims. Instead, they cited only *Peterman, supra*, which addressed a state constitutional taking claim rather than a federal one. *Peterman,* at 184. Nor did Petitioners make any claim in their motion for rehearing before the Michigan Supreme Court that the Court's failure to reach the federal claim in its Opinion was error.

Under Michigan law, constitutional claims are not properly before the appellate courts unless they were presented to the trial court. *Dagenhardt v. Special Machine & Engineering, Inc.*, 418 Mich. 520, 345 N.W.2d 164 (1984); *Booth Newspapers, Inc. v. Univ. of Michigan Bd. of Regents*, 444 Mich. 211, 234, 507 N.W.2d 422 (1993). If a constitutional claim is not pleaded in the complaint, or addressed by the trial court, or raised in the statement of questions presented to the appellate court, it is not properly preserved for appellate review. *Id. Advocacy Organization*

for Patients & Providers v. Auto Club Insurance Assoc., 257 Mich.App. 365, 670 N.W.2d 569 (2003). Here, Petitioners did not plead any federal taking or due process claim in their complaint, nor did the trial court address any taking or due process issues. Nor did Petitioners raise their federal claims in their statement of questions presented in either the Michigan Court of Appeals or the Michigan Supreme Court (nor did they address the issue at all in the Court of Appeals). Petitioners thus failed to raise any taking and due process claim "at the time and in the manner required by state law," so that the claims were not properly presented to the state court. *Adams, supra.*

Petitioners also failed to present their federal claims with fair precision and in due time. It cannot be reasonably alleged that Petitioners' first substantive presentation of their federal constitutional claims in their motion for reconsideration *after* the Michigan Supreme Court rendered its Opinion, was in due time.

This Court recently found a lack of fair precision where the petitioner failed to cite to the state court the Federal Constitution or any of this Court's cases construing it. *Howell, supra*; see also *Adams, supra*, at 89, n. 3. In their passing invocation of a federal taking claim footnoted in their brief on appeal in the Michigan Supreme Court, Petitioners likewise failed to cite the Federal Constitution or any cases construing federal takings claims. Brief on Appeal – Appellees, p. 21, n. 9. Petitioners also failed to even mention their federal due process claim until their motion for reconsideration to the Michigan Supreme Court. Petitioners thus failed to present their federal claims with "fair precision and in due time." *Adams, supra.*

CONCLUSION

For all of these reasons, Respondent requests that the Petition be denied.

Respectfully submitted,

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Dated: January 11, 2006

No. 05-764

In The

Supreme Court of the United States

RICHARD A. GOECKEL and
KATHLEEN D. GOECKEL,

Petitioners,

v.

JOAN M. GLASS,

Respondent.

On Petition For A Writ Of Certiorari To The Michigan Supreme Court

PETITIONERS' BRIEF IN REPLY

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QUESTION PRESENTED

WHETHER PETITIONERS PROPERLY RAISED THEIR FEDERAL CLAIMS BELOW, SUCH THAT THIS COURT MAY PROPERLY REVIEW THE DECISION OF THE MICHIGAN SUPREME COURT.

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INTRODUCTION

Petitioners submit their reply brief pursuant to Supreme Court Rule 15 solely to respond to Respondent's assertion, not addressed in the Petition, that "Petitioners failed to properly raise their federal constitutional challenge in the state court proceedings." Because they raised their federal constitutional claims immediately upon a sudden and unexpected taking of title to their beach property by the Michigan Court of Appeals, and again when the Michigan Supreme Court suddenly and unexpectedly took away their long-established, well-followed, and state-enforced exclusive rights of possession, Petitioners raised their federal claims with "fair precision and in due time."

PETITIONERS PROPERLY RAISED THEIR FEDERAL CLAIMS, AND THIS COURT MAY PROPERLY REVIEW THE DECISION OF THE MICHIGAN SUPREME COURT.

Respondent has challenged the jurisdiction of this Court to review in this case the taking of 3,288 miles of shoreline by the Michigan Supreme Court for use of the public, asserting in her Brief that Petitioners did not timely raise any federal constitutional issue in the state courts, and that the Michigan Supreme Court did not consider any constitutional claim. As explained below, these assertions are incorrect, and this Court does in fact have jurisdiction.

As it relates to the Petition before this Court, the gravamen of Respondent's Complaint is contained in paragraphs 22 and 24:

> The *shoreland and waters* of Lake Huron lying below and lakeward of the natural ordinary high water mark *are subject*, under federal and state statutory law and common law, *to a navigational servitude* held by the state of Michigan, and a dominant navigational servitude held by the United States, under which *such land* and water *is held in trust* for the benefit of the people of this state and country *for navigational and recreational activities* . . . As a resident and citizen . . . , [p]laintiff *has* the right to navigate and walk across those portions of the shore and waters of Lake Huron lying below and lakeward of the natural ordinary high-water mark . . . (emphasis added).

Petitioners responded to these allegations by denying them and affirmatively asserting the state of the law as it then existed:

> Great Lakes riparian owners [sic] title line is wherever the water's edge exists at the moment. It is known as the "Moveable Freehold" Doctrine. The right of the riparian owner [is] subject to the Great Lakes Submerged Lands Act, being MCLA 322.701, et seq. This Act does not change the moveable freehold theory, as the State of Michigan does not have title to the property between the statutory fixed ordinary high water mark and the actual water's edge. The State, pursuant to the Great Lakes Submerged Lands Act, has the right to regulate the use of the same. The Riparian owner has the right to the exclusive use of the property to the water's edge, which may be a moveable line as the water rises and falls. . . . Plaintiff and others have the right to navigate portions of the water above the low water mark

> but to [sic] not have the right to walk on those portions above the then existing water line . . . .

In reviewing Respondent's Complaint, it is clear that the question set up by her Complaint was whether she had a right of beachwalking under existing Michigan law, and not whether Michigan law should be *changed* to establish such a right. Moreover, no government action was presented by the pleadings; no taking had occurred; and no due process had been denied. Under these facts, Petitioners were not put on notice that the State would be confiscating their shoreline rights, and had no reason to plead the existence of a taking or lack of due process, as suggested in Respondent's Brief. Respondent's Brief in Opposition, pp 25-26.

Judge Kowalski's ruling (later invalidated on appeal) that a state statute granted Respondent beachwalking rights did not address the change in the common law complained of by this Petition. It was only when the Michigan Court of Appeals ruled that, by virtue of state common law, the state – and not the Goeckels – owned the beach, that Petitioners were put on notice that th State of Michigan might through its courts use this case as an opportunity to take Petitioners' beach from them. App, p 109. In response to that unexpected ruling, Petitioners in their Brief to the Michigan Supreme Court specifically asserted the issue they present to this Court:

> Regardless of whether action from this Court, or the Legislature, any retreat from the water's edge proclamation in *Hilt* . . . would deprive beachfront property owners of land to which they had either title or exclusive right to use, and would therefore constitute an unconstitutional taking without compensation under both State

> and Federal law. See *Peterman*, supra, brief of Amici Curiae Michigan Chamber of Commerce, et al., Section III C, and Brief of Defendants (sic) of Property Rights, Section II.

Brief on Appeal – Appellees, p 21, n 9.

The well-written Brief of Defenders of Property Rights, adopted by Petitioners both in note 9 and at page 33 of their Brief, was devoted almost entirely to the federal takings issue, specifically citing the Fifth and Fourteenth Amendments to the United States Constitution. Moreover, that brief specifically addressed the course complained of in the Petition at issue:

> Both the Supreme Court and other federal courts have repeatedly held that when the government takes the title to real property, or destroys the owner's ability to exclude others, a categorical violation of the Fifth Amendment's just compensation clause has occurred for which compensation must be paid.

Id. at 6, citing *Yee* v *City of Escondido*, 503 US 519, 522; 112 S Ct 1522; 118 L Ed2d 153 (1992).

Notwithstanding this briefing, the Michigan Supreme Court changed Michigan law, not by affirming the taking of *title* by the Court of Appeals, but by suddenly imposing a new concept of public trust which it now says has always existed separate from title. Of course, "[c]ourts seldom confess to changing the law." Thompson, *Judicial Takings*, 76 Va L R 1449, 1478 (1990). Instead, the Michigan Supreme Court incredibly concluded that the exclusive use rights described in the state's caselaw, acknowledged by its attorney general, and implemented by its administrative agencies and law enforcement, simply never existed. App,

p 35 ("the state cannot take what it already owns.").[1] Presumably in response to Petitioners' argument that "a categorical violation of the Fifth Amendment's just compensation clause" occurs when government "destroys the owners' ability to exclude others," the court ruled that "no taking occurs when the state protects and retains that which it could not alienate: public rights held pursuant to the public trust doctrine." Brief on Appeal – Appellees, pp 21, 33; Brief of Defenders of Property Rights, p 6; App, p 35. The Michigan Supreme Court was well briefed on the federal takings issue, and its ruling appears to have considered and decided the issue.

Despite this background, Respondent makes numerous arguments denying this Court's jurisdiction. She complains that "Petitioners did not plead any federal taking or due process claim in their complaint, nor did the trial court address any taking or due process issues." Respondent's Brief, p 26. Yet Respondent does not demonstrate how Petitioners could properly do so before any state action had in fact occurred.

Respondent then complains that Petitioners did not "raise their federal claims in their statement of questions presented in either the Michigan Court of Appeals or the Michigan Supreme Court (nor did they address the issue at all in the Court of Appeals.)." *Id.* This Court has not required such technical niceties:

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[1] It is illuminating that in effecting its taking of Michigan's 3,288 miles of shoreline for the use of the public, and then denying a taking, the Michigan Supreme Court implicitly suggested that federal courts such as this Court would not interfere with that ruling. App 35, n 35.

> No particular method of presenting federal issues is required by the Supreme Court's own jurisdictional – or prudential – limits. The test is functional, in response to the policies underlying the presentation requirement. Wright et al, *Federal Practice and Procedure*, §4022, p 327 (1996).

Under Michigan jurisprudence, only the Michigan Supreme Court has the power to change – subject to constitutional protections – the common law. Petitioners squarely put the federal constitutional question at issue in their brief for that Court to consider as it contemplated the question before it. Respondent points to no policy reason which is frustrated by this method of presentation.

Finally, because only the Michigan Supreme Court may effect a change in Michigan common law, Petitioners' due process and takings claims did not arise until the Michigan Supreme Court unexpectedly departed with precedent and effected a taking of Petitioners' riparian rights, long considered property under Michigan law. In response, Petitioners filed their Brief in support of Motion for Rehearing, specifically including their takings claim in their Statement of Questions Presented. This Court has found jurisdiction in similar circumstances, even where federal issues were not necessarily addressed in the state court. In *PruneYard Shopping Center* v *Robbins*, 447 US 74, 85 n 9; 100 S Ct 2035; 64 L Ed2d 741 (1980), this Court found that "federal claims . . . have been adequately presented even though not raised in lower state courts when the highest state court renders an unexpected interpretation of state law or reverses its prior interpretation." Indeed, a contrary result would leave a state's highest court free to enact a surprising change in property law in any given case and then avoid review by this Court.

As *PruneYard* suggests, this is not the law. The facts demonstrate that Petitioners presented their federal claims with "fair precision and in due time," *Adams* v *Robertson*, 520 US 83; 117 S Ct 1028; 137 L Ed2d 203 (1997), and that alone is sufficient for the Court to properly consider Petitioners' claim.

Even where a party fails to raise a federal issue in the state courts, where a state's highest court rules on a federal issue, it may properly be reviewed by this Court. *First English Evangelical Lutheran Church* v *County of Los Angeles*, 482 US 304, 313 n 8; 107 S Ct 2378; 96 L Ed2d 250 (1987). The court below denied a taking without specifying whether it was considering a taking under federal or state law. But it is instructive in this context that the court below cited *Phillips Petroleum Co* v *Mississippi*, 484 US 469, 475; 108 S Ct 791; 98 L Ed2d 877 (1988) for the proposition that the question is one of state law. App 35-36, n 35. Moreover, the court was apparently responding to Petitioners' Brief, and those adopted by it, referring to a taking under both state and federal law.

In any event, even if the reference by the court below was limited to the state question, this Court has found the federal issue sufficiently preserved. See *Wood* v *Georgia*, 450 US 261; 101 S Ct 1097; 67 L Ed2d 220 (1981) (equal protection argument preserved where defense counsel's conflict of interest raised in court below).

CONCLUSION

For the foregoing reasons, Petitioners submit that their due process and federal takings claims were timely submitted in the Michigan courts, and that this Court may, and should, grant their Petition and review this case. Petitioners respectfully submit that a failure to do so will fuel the spreading fire of judicial confiscation of riparian property rights.

Dated: February 15, 2006

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